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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GREGORY BUSHANSKY, Individually and)
on Behalf of All Others Similarly Situated,)

Plaintiff,)

v.)

WASHINGTON MUTUAL, INC., ANNE V.)
FARRELL, STEPHEN E. FRANK, KERRY K.)
KILLINGER, THOMAS C. LEPPERT,)
CHARLES M. LILLIS, PHILLIP D.)
MATTHEWS, REGINA T. MONTOYA,)
MICHAEL K. MURPHY, MARGARET)
OSMER MCQUADE, MARY E. PUGH,)
WILLIAM G. REED, JR., ORIN C. SMITH,)
JAMES H. STEVER, DARYL D. DAVID, and)
JOHN AND JANE DOES 1-20,)

Defendants.)

CASE NO.

C07-1874 RAJ

CLASS ACTION

**COMPLAINT FOR BREACHES OF
FIDUCIARY DUTY UNDER THE
EMPLOYEE RETIREMENT INCOME
SECURITY ACT**



07-CV-01874-CMP

I. INTRODUCTION

1. Plaintiff Gregory Bushansky ("Plaintiff") alleges the following based upon personal information as to himself and the investigation of Plaintiff's counsel, which included a review of U.S. Securities and Exchange Commission ("SEC") filings by Washington Mutual, Inc. ("WaMu" or the "Company"), including the Company's proxy statements (Form DEF 14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K), registration statement (Form S-8), and the annual reports (Form 11-K) filed on behalf of the

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1 WaMu Savings Plan (the "Plan"), a review of the Forms 5500 filed by the Plan with the
 2 Department of Labor with the U.S. Department of Labor, interviews with participants of the
 3 Plan, and a review of available documents governing the operations of the Plan. Plaintiff
 4 believes that substantial additional evidentiary support will exist for the allegations set forth
 5 herein after a reasonable opportunity for discovery.
 6

7 II. NATURE OF THE ACTION

8 2. This is a class action brought on behalf of the Plan pursuant to §§ 502(a)(2) and
 9 (a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(a)(2) &
 10 (a)(3), against the fiduciaries of the Plan for violations of ERISA.

11 3. The Plan is a defined contribution retirement plan sponsored by WaMu.

12 4. Plaintiff's claims arise from the failure of Defendants, who are fiduciaries of the
 13 Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise
 14 the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets
 15 during the period July 19, 2006 through the present (the "Class Period").
 16

17 5. Plaintiff alleges that Defendants allowed the imprudent investment of the Plan's
 18 assets in WaMu common stock throughout the Class Period despite the fact that they knew or
 19 should have known that such investment was unduly risky and imprudent due to the Company's
 20 serious mismanagement and improper business practices, including, among other practices: (a)
 21 the Company's over reliance on subprime lending; (b) the Company's participation in the
 22 systematic manipulation of the loan origination process; (c) the Company's failure to implement
 23 and maintain risk management control processes; and (d) the Company's failure properly to
 24 account for its subprime lending business operations, all of which caused WaMu's financial
 25 statements to be misleading and which artificially inflated the value of shares of WaMu stock
 26

1 and the WaMu Stock Fund in the Plan ("Fund"). In short, during the Class Period, the Company
 2 was seriously mismanaged and faced deteriorating financial circumstances that rendered WaMu
 3 stock an unduly risky and inappropriate investment option for participants' retirement savings.

4 6. Plaintiff alleges in Count I that the Defendants who were responsible for the
 5 investment of the Plan's assets breached their fiduciary duties to the Plan's participants in
 6 violation of ERISA by failing to prudently and loyally manage the Plan's investment in WaMu
 7 stock. In Count II, Plaintiff alleges that the Defendants, who were responsible for the selection,
 8 monitoring and removal of the Plan's other fiduciaries, failed to properly monitor the
 9 performance of their fiduciary appointees and remove and replace those whose performance was
 10 inadequate. In Count III, Plaintiff alleges that the Defendants breached their duty to inform the
 11 Plan's participants by failing to provide complete and accurate information regarding the
 12 soundness of WaMu stock and the prudence of investing and holding retirement contributions in
 13 WaMu equity. In Count IV, Plaintiff alleges that Defendants breached their duties and
 14 responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties
 15 of prudent and loyal management, complete and accurate communications, and adequate
 16 monitoring. Finally, in Count V, Plaintiff states a claim against WaMu for knowing participation
 17 in the fiduciary breaches alleged herein.

18 7. As more fully explained below, during the Class Period, Defendants imprudently
 19 permitted the Plan to hold and acquire millions dollars in WaMu stock despite the fundamental
 20 problems the Company faced. Based on publicly available information for the Plan, it appears
 21 that Defendants' breaches have caused the Plan to lose well over *175 million dollars* of
 22 retirement savings during the Class Period.

1 8. This action is brought on behalf of the Plan and seeks to recover losses to the Plan
 2 for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C.
 3 §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3),
 4 Plaintiff seeks other equitable relief from Defendants, including, without limitation, injunctive
 5 relief and, as available under applicable law, constructive trust, restitution, equitable tracing, and
 6 other monetary relief.
 7

8 9. ERISA §§ 409(a) and 502(a)(2) authorize participants such as the Plaintiff to sue
 9 in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary
 10 duty. Pursuant to that authority, Plaintiff brings this action as a class action under Fed. R. Civ. P.
 11 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested
 12 in WaMu common stock during the Class Period.
 13

14 10. In addition, because the information and documents on which Plaintiff's claims
 15 are based are, for the most part, solely in Defendants' possession, certain of Plaintiff's
 16 allegations are made by necessity upon information and belief. At such time as Plaintiff has had
 17 the opportunity to conduct discovery, Plaintiff will, to the extent necessary and appropriate,
 18 amend this Complaint, or, if required, seek leave to amend, to add such other additional facts as
 19 are discovered that further support Plaintiff's claims.
 20

21 III. JURISDICTION AND VENUE

22 11. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this
 23 action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

24 12. **Personal Jurisdiction.** ERISA provides for nationwide service of process.
 25 ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the
 26 United States or subject to service in the United States and this Court therefore has personal

1 jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R.
 2 Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general
 3 jurisdiction in the State of Washington.

4 13. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C.
 5 § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary
 6 breaches for which relief is sought occurred in this district, and/or some Defendants reside and/or
 7 transact business in this district.

9 IV. PARTIES

10 A. Plaintiff.

11 14. Plaintiff Gregory Bushansky is a resident of Massapequa, New York. Plaintiff
 12 Bushansky is a participant in Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and
 13 was a participant in the Plan throughout the Class Period. He continues to hold shares of
 14 Company stock in his retirement account in the Plan and did so throughout the Class Period.

16 B. Defendants.

17 15. The Defendants are identified below. All of the Defendants are fiduciaries of the
 18 Plan within the meaning of ERISA, as is explained below in Section VI ("Defendants' Fiduciary
 19 Status"), and all of them breached their fiduciary duties in various ways as is explained in
 20 Section XI ("Causes of Action").

21 16. **Defendant Washington Mutual, Inc.** is a consumer and small business banking
 22 company with operations in major U.S. markets. WaMu is incorporated in the State of
 23 Washington, with its principal executive offices located at 1301 Second Avenue, Seattle,
 24 Washington. WaMu's common stock is listed on the New York Stock Exchange and trades
 25
 26

1 under the ticker symbol "WM." As described more fully below, the Company was a fiduciary
 2 for the Plan.

3 17. **Director Defendants.** The WaMu Board of Directors (hereinafter the "Board") is
 4 the governing body of WaMu under its charter, its bylaws, and applicable Washington law, and,
 5 unless otherwise-noted, comprises the persons who carried out the Company's responsibilities
 6 with respect to the Plan. The members of the Board during the Class Period included:
 7

8 a. **Defendant Anne V. Farrell** has served as a Director of WaMu since
 9 1994.

10 b. **Defendant Stephen E. Frank** has served as a Director of WaMu since
 11 1997.

12 c. **Defendant Kerry K. Killinger** has served as a Director of WaMu since
 13 1988 and is the Chairman and Chief Executive Officer of WaMu. Defendant
 14 Killinger served as the President of the Company from 1988 until 2005. He
 15 became the Chief Executive Officer in 1990 and the Chairman of the Board of
 16 Directors in 1991.

17 d. **Defendant Thomas C. Leppert** has served as a Director of WaMu since
 18 2005.

19 e. **Defendant Charles M. Lillis** has served as a Director of WaMu since
 20 2005.

21 f. **Defendant Phillip D. Matthews** has served as a Director of WaMu since
 22 1998.

23 g. **Defendant Regina T. Montoya** has served as a Director of WaMu since
 24 2006.

1 h. **Defendant Michael K. Murphy** has served as a Director of WaMu since
2 1985.

3 i. **Defendant Margaret Osmer McQuade** has served as a Director of
4 WaMu since 2002.

5 j. **Defendant Mary E. Pugh** has served as a Director of WaMu since 1999.

6 k. **Defendant William G. Reed, Jr.** has served as a Director of WaMu since
7 1970.

8 l. **Defendant Orin C. Smith** has served as a Director of WaMu since 2005.

9 m. **Defendant James H. Stever** has served as a Director of WaMu since
10 1991.

11
12 18. As is explained in more detail below, the Board had certain responsibilities with
13 respect to the Plan, including appointment and oversight responsibilities, and the Board and its
14 members were therefore fiduciaries of the Plan. The Board and its members listed above are
15 referred to as the "Director Defendants."

16
17 19. **Human Resources Committee Defendants.** As explained in more detail below,
18 the Human Resources Committee of the Board of Directors ("HR Committee") had certain
19 responsibilities with respect to the Plan, including appointment and oversight responsibilities,
20 and the HR Committee and its members were therefore fiduciaries of the Plan. The Defendants
21 identified in this paragraph are referred to as the "HR Committee Defendants." On information
22 and belief, the HR Committee Defendants are as follows:

23
24 a. **Defendant Stever** has served as a member of the HR Committee during
25 the Class Period and is the Committee's Chairman.

26 b. **Defendant Frank** has served as a member of the HR Committee during

1 the Class Period.

2 c. **Defendant Lillis** has served as a member of the HR Committee during the
3 Class Period.

4 d. **Defendant Matthews** has served as a member of the HR Committee
5 during the Class Period.

6 e. **Defendant Osmer McQuade** has served as a member of the HR
7 Committee during the Class Period.

8
9 20. **Plan Investment Committee Defendants.** As explained in more detail below,
10 the Investment Committee Defendants have the responsibility for selecting the investment funds
11 in the Plan and were assigned the responsibility for monitoring the performance of those funds
12 by the Company, the Board and/or the HR Committee. The identities of the Investment
13 Committee Defendants are currently unknown to Plaintiffs and are therefore named fictitiously
14 as John and Jane Does 1-10. Once the identities of the Investment Committee Defendants are
15 ascertained, Plaintiff will seek leave to join them under their true names. The Investment
16 Committee Defendants (John and Jane Does 1-10) are referred to as the "Investment Committee
17 Defendants."
18

19 21. **Plan Administration Committee Defendants.** As explained more fully below,
20 on information and belief, the Plan assigns certain fiduciary responsibilities and duties to the
21 Plan Administration Committee. The Administration Committee members have full authority
22 and power to administer and construe the Plan. On information and belief, the individual
23 Administration Committee Defendants are as follows:
24

25 (a). **Defendant Daryl D. David** has served as a member of the Administration
26 Committee during the Class Period.

22. The identities of the remaining members of the Administration Committee are currently unknown to the Plaintiff and are therefore named fictitiously as John and Jane Does 11-20. Once the identities of additional Administration Committee members are ascertained, Plaintiff will seek leave to join them under their true names. The Administration Committee and its members (Defendant David and John and Jane Does 11-20) are referred to as the "Administration Committee Defendants."

V. THE WAMU SAVINGS PLAN

23. The Plan, sponsored by WaMu, is an "employee pension benefit plan," as defined by § 3(2)(A) of ERISA, 29 U.S.C. § 1002(2)(A). The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

24. The assets of an employee benefit plan, such as the Plan here, must be "held in trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period, the assets of the Plan were held in a trust fund administered by Fidelity Management Trust Company, the Plan's Trustee. *See* WaMu Savings Plan Summary Plan Description (Jan. 2007) (hereinafter the "SPD") at 32.

25. The Plan became effective on July 1, 1973. The purpose of the Plan is to encourage employees to accumulate capital for their retirement. *See* WaMu Savings Plan as Amended and Restated Effective January 31, 2006 (hereinafter the "Plan Document").

26. Employees are eligible to participate in the Plan at commencement of their employment. *Id.* § 2.2.

1 27. Individual accounts are maintained for each Plan participant. Participants'
 2 accounts are credited with Employer and Participant-directed contributions and earnings,
 3 expenses, gains and losses. *Id.* § 9.1

4 28. Throughout the Class Period, participants in the Plan were permitted to defer a
 5 percentage of their base compensation for investment in the Plan. Plan participants are allowed
 6 to contribute between 1% and 75% of their compensation, up to the annual maximum
 7 permissible under the Internal Revenue Code. *Id.* § 4.1.

8 29. Effective January 1, 2004, the Company matches: (a) 100% of a participant's
 9 contributions that does not exceed 3% of the participant's considered compensation for the Plan
 10 Year; plus (b) 50% of a participant's contribution in excess of the first 3% of the participants
 11 considered compensation, up to 5% of a participant's considered compensation for the Plan
 12 Year, for a maximum total matching contribution of 4% of a participants considered
 13 compensation for the Plan Year. *Id.* § 5.1.

14 30. Effective January 1, 2004, a Profit Sharing Contribution may be made in an
 15 amount, if any, determined by the Employer, in its sole and absolute discretion. *Id.* § 5.2.

16 31. The Plan fiduciaries, by and through the Investment Committee, select the
 17 investment options made available to participants of the Plan. *Id.* § 10.1. The Plan fiduciaries,
 18 by and through the Investment Committee, are provided with authority to change Plan
 19 investment options from time to time in their discretion. *Id.* §§ 10.1, 12.2(c). The Plan does not
 20 limit the fiduciaries' ability to change investment options.

21 32. The Company Stock Fund is one of the investment options selected by the Plan
 22 fiduciaries. Nothing in the Plan requires this option, or as noted above, limits the ability of the
 23 Plan fiduciaries to remove the option, or divest assets invested in the option as prudence dictates.

35. An employee stock ownership plan is an ERISA plan that is designed to invest primarily in “qualifying employer securities.” 29 U.S.C. § 1107(d)(6)(A). As with a 401(k) plan without an ESOP component, fiduciaries of an ESOP remain bound by core ERISA fiduciaries duties, including the duties to act loyally, prudently, and for the exclusive purpose of providing benefits to plan participants.

36. The Plan has incurred substantial losses as a result of the Plan's investment in WaMu common stock. As of December 31, 2006, the Plan held approximately 8 million shares of WaMu common stock, then having a market value of approximately \$341.4 million. See WaMu Savings Plan, Annual Report (Form 11-K") at 14 (Dec. 31, 2006) (hereinafter the "2006 Form 11-K"). Following revelations that WaMu failed to establish adequate reserves for its loan losses due to subprime lending and participated in the manipulation of loan originations, among other improper practices, WaMu common stock has collapsed. The price of WaMu stock has dropped approximately 60 percent since the beginning of the Class Period.

A. The Nature of Fiduciary Status.

37. **Named Fiduciaries.** Every ERISA plan must have one or more “named fiduciaries.” ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the “administrator” in the plan instrument is automatically a named fiduciary, and in the absence of

1 such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C.
2 § 1002(16)(A).

3 **38. De Facto Fiduciaries.** ERISA treats as fiduciaries not only persons explicitly
4 named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who
5 in fact perform fiduciary functions. Thus a person is a fiduciary to the extent “(i) he exercises
6 any discretionary authority or discretionary control respecting management of such plan or
7 exercises any authority or control respecting management or disposition of its assets, (ii) he
8 renders investment advice for a fee or other compensation, direct or indirect, with respect to any
9 moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he
10 has any discretionary authority or discretionary responsibility in the administration of such plan.”
11 ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).
12

13 **39.** Each of the Defendants was a fiduciary with respect to the Plan and owed
14 fiduciary duties to the Plan and the participants and beneficiaries under ERISA in the manner
15 and to the extent set forth in the Plan’s documents, through their conduct, and under ERISA.
16

17 **40.** As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C.
18 § 1104(a)(1), to manage and administer the Plan, and the Plan’s investments solely in the interest
19 of the Plan’s participants and beneficiaries and with the care, skill, prudence, and diligence under
20 the circumstances then prevailing that a prudent man acting in a like capacity and familiar with
21 such matters would use in the conduct of an enterprise of a like character and with like aims.
22

23 **41.** Plaintiff does not allege that each Defendant was a fiduciary with respect to all
24 aspects of the Plan’s management and administration. Rather, as set forth below, Defendants
25 were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or
26

1 exercised by each of them, and, as further set forth below, the claims against each Defendant are
 2 based on such specific discretion and authority.

3 42. Instead of delegating all fiduciary responsibility for the Plan to external service
 4 providers, WaMu chose to assign the appointment and removal of fiduciaries to itself and the
 5 other monitoring Defendants named herein. These persons and entities in turn selected WaMu
 6 employees, officers and agents to perform most fiduciary functions.

7 43. ERISA permits fiduciary functions to be delegated to insiders without an
 8 automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U.S.C.
 9 § 1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of
 10 participants and beneficiaries, not in the interest of the Plan sponsor.

11 **B. WaMu's Fiduciary Status.**

12 44. The Plan Document states that WaMu or the Board of Directors are authorized to
 13 appoint, and hence to monitor and remove, the members of the Investment Committee. Plan
 14 Document § 2.39. As Department of Labor regulations make clear, these are fiduciary functions
 15 under ERISA. 29 C.F.R. § 2509.75-8 (D-4).

16 45. WaMu also had the responsibility to appoint, and hence to monitor and remove,
 17 the Trustee, and, upon information and belief, to execute the Trust documents with the Trustee to
 18 provide for the investment, management and control of the assets of the Plan. Plan Document §
 19 11.2.

20 46. Moreover, WaMu, at all applicable times, on information and belief, has
 21 exercised control over the activities of its employees that performed fiduciary functions with
 22 respect to the Plan, including the Investment Committee Defendants and Administration
 23 Committee Defendants, and, on information and belief, can hire or appoint, terminate, and
 24

1 replace such employees at will. WaMu is, thus, responsible for the activities of its employees
2 through traditional principles of agency and *respondeat superior* liability.

3 47. Finally, under basic tenants of corporate law, WaMu is imputed with the
4 knowledge that the Defendants had regarding the misconduct alleged herein, and, hence, like the
5 fiduciaries who acted on WaMu's behalf, had knowledge of the imprudent actions alleged
6 herein.
7

8 48. Consequently, in light of the foregoing duties, responsibilities, and actions,
9 WaMu was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21),
10 during the Class Period in that it exercised discretionary authority or discretionary control
11 respecting management of the Plan, exercised authority or control respecting management or
12 disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility
13 in the administration of the Plan.
14

15 **C. The Director Defendants Fiduciary Status.**

16 49. WaMu, as a corporate entity, cannot act on its own without any human
17 counterpart. In this regard, during the Class Period, on information and belief, WaMu relied and
18 continues to rely directly on the Board of Directors to carry out its fiduciary responsibilities
19 under the Plan and ERISA.
20

21 50. Specifically, the Director Defendants were responsible for appointing, and hence
22 monitoring, and removing, the members of the Investment Committee. *Id.* at 2.39. Thus,
23 according to Department of Labor regulations, the Director Defendants, exercised a fiduciary
24 function under ERISA. 29 C.F.R. § 2509.75-8 (D-4).

25 51. Consequently, in light of the foregoing duties, responsibilities, and actions, the
26 Director Defendants were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29

1 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or
 2 discretionary control respecting management of the Plan, exercised authority or control
 3 respecting management or disposition of the Plan's assets, and/or had discretionary authority or
 4 discretionary responsibility in the administration of the Plan.

5
 6 **D. HR Committee Defendants' Fiduciary Status.**

7 52. The Director Defendants established the HR Committee to act as a fiduciary to
 8 "[o]versee the management of any Plan trust funds and periodically review the performance of
 9 the funds and the investment managers of the funds for the purpose of assessing their
 10 effectiveness." See HR Committee Charter at 1. The HR Committee reported to the Board of
 11 Directors, which retained decision-making authority on behalf of the Company. HR Committee
 12 Charter.

13
 14 53. The scope of the HR Committee's responsibilities are not entirely clear from the
 15 Plan Document. Whereas the Plan charges "WaMu or the Board" with responsibility for
 16 appointing the Investment Committee, the Plan subsequently states that The HR Committee is
 17 responsible for appointing "a Plan Administration Committee and a Plan Investment
 18 Committee." Compare Plan Document § 2.38 and § 12.1. To the extent that the HR Committee
 19 exercised responsibility for appointing, monitoring, and removing other Plan fiduciaries,
 20 according to Department of Labor regulations, the HR Committee Defendants exercised a
 21 fiduciary function under ERISA. 29 C.F.R. § 2509.75-8 (D-4).

22
 23 54. Consequently, in light of the foregoing duties, responsibilities, and actions, the
 24 HR Committee Defendants were *de facto* fiduciaries of the Plan within the meaning of ERISA §
 25 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary
 26 authority or discretionary control respecting management of the Plan, exercised authority or

control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

E. Investment Committee Defendants' Fiduciary Status.

55. The Plan provides that the Investment Committee is a "Named Fiduciary" for purposes of § 402(a) of ERISA. The Investment Committee Defendants had the responsibility of selecting the investments in the Plan and monitoring the performance of the investment funds, including the Company Stock Fund in the Plan. Plan Document §§ 10.2(a), 12.2(c).

56. The Investment Committee also is authorized to "change the investment funds from time to time in its discretion." *Id.* § 10.2(a).

57. In addition, the Investment Committee has the following powers and duties:

- i. To direct the Trustee in the investment, reinvestment, and disposition of the Trust, including the investment of up to 100% of the Trust in qualifying employer securities. (as defined in section 407(d)(5) of ERISA) without regard to the limitations of ERISA sections 407(a)(2), (3), or (4), as provided in the Trust Agreement;
- ii. To review, select or remove, and monitor investment funds and fund managers;
- iii. To receive and review reports of the financial condition and of the receipts and disbursements of the Trust from the Trustee;
- iv. To furnish the Employer with information which the Employer may require for tax or other purposes;
- v. To engage the services of or remove an Investment Manager or Managers (as defined in ERISA section 3(38)), each of whom shall have full power and authority to manage, acquire or dispose (or direct the Trustee with respect to acquisition or disposition) of any Plan asset under its control; and
- vi. To interpret and construe the Plan with respect to the investment, reinvestment, and disposition of Plan assets.

Plan Document § 12.2(c).

1
2 58. The Plan's Form 11-K states that the HR Committee "delegated its duties with
3 respect to Plan investments to the Plan Investment Committee." 2006 11-K at 8.

4 59. Consequently, in light of the foregoing duties, responsibilities, and actions, the
5 Investment Committee Defendants were named fiduciaries of the Plan pursuant to ERISA §
6 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21),
7 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control
8 respecting management of the Plan, exercised authority or control respecting management or
9 disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility
10 in the administration of the Plan.

11
12 **F. Administration Committee Defendants' Fiduciary Status.**

13 60. The Plan provides that the Administration Committee is a "Named Fiduciary" for
14 purposes of § 402(a) of ERISA. The Plan also provides that the Administration Committee is the
15 "Plan Administrator," and that it shall have the following powers and duties:

- 16
17 i. Make and enforce such rules and regulations as it shall deem necessary or
proper for the efficient administration of the Plan;
18
19 ii. Interpret the provisions of the Plan and resolve any question arising under
the Plan, or in connection with the administration or operation thereof;
20
21 iii. Make all determinations affecting the eligibility of any Employee to be or
become a Participant;
22
23 iv. Determine eligibility for and amount of retirement benefits for any
Participant;
24
25 v. Authorize and direct the Trustee with respect to all disbursements of
benefits under the Plan;
26
vi. Employ and engage such persons, counsel and agents and to obtain such
administrative, clerical, medical, legal, audit and actuarial services as it
may deem necessary in carrying out the provisions of the Plan;

- vii. Delegate and allocate specific responsibilities, obligations and duties imposed by the Plan to one or more employees, officers or such other persons as the Plan Administrator deems appropriate; and
- viii. Amend the Plan for changes in the laws or regulations related to the Plan, to clarify any provisions in the Plan or correct any errors in the document, to simply administration or for administrative convenience, and for any other reason provided that with respect to an amendment for any other reason., the delegate reasonably believes that the amendment will not have the impact of significantly increasing the cost or potential liability exposure of the Plan to the Employer. The authority set forth in this section 12.2(b)(viii) may be delegated only to a senior executive of the Company.

Plan Document § 12.2(b).

61. Moreover, upon information and belief, in order to comply with ERISA, during at least part of the Class Period the Administration Committee exercised responsibility for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner, by means of the Plan's SPDs. See ERISA § 101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description).

62. The SPDs and, on information and belief, other information disseminated by the Administration Committee to the participants of the Plan incorporated by reference the SEC filings described below, which contained misleading information regarding the financial condition of WaMu and its results of operations.

63. Consequently, in light of the foregoing duties, responsibilities, and actions, the Administration Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or

discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

VII. FACTS BEARING ON FIDUCIARY BREACH

A. **WaMu Was an Imprudent Investment for the Plan during the Class Period Because of its Serious Mismanagement, Precipitous Decline in the Price of its Stock and its Rapidly Deteriorating Financial Condition.**

1. **Summary.**

64. During the Class Period, WaMu stock became an imprudent investment for participants' retirement savings because of, *inter alia*, the Company's highly risky and inappropriate origination practices and related financial mismanagement, which artificially inflated the value of WaMu stock and exposed the Plan to huge losses.

65. WaMu's inappropriate origination practices and related mismanagement concern, among other problems, the Company's: (1) increasingly risk-fraught lending practices; (2) lack of adequate risk-management controls over its improper lending practices contributing to high delinquency and foreclosure rates among borrowers; (3) role in the systematic inflation of property appraisals during the loan origination process; and (4) misrepresentations regarding the Company's financial condition, which caused the price of WaMu stock to be artificially inflated during the Class Period.

66. Throughout the Class Period, the Company suffered from grave mismanagement and corresponding deterioration of its financial condition. As the consequences of this conduct have come to light, WaMu's share price has lost 60 percent of its value. Accordingly, under these circumstances, investment in WaMu stock was imprudent, as reflected in the enormous losses suffered by the Plan.

1 **2. The Rise of the Subprime Lending Industry.**

2 67. WaMu, like the mortgage banking industry as a whole, experienced rapid growth
3 in mortgage loan revenue in recent years. Between 2003 and 2005, WaMu's production of
4 subprime loans increased from \$14.1 billion to \$34.5 billion. Annual Report (Form 10-K) (Dec.
5 31, 2005) (hereinafter the "2005 Form 10-K").
6

7 68. Industry experts have attributed the proliferation of subprime loans to a
8 confluence of factors in 2004 and 2005, including rising home prices, declining affordability,
9 historically low interest rates, intense lender competition, innovations in the structure and
10 marketing of mortgages, and an abundance of capital from lenders and mortgage securities
11 investors. See Sandra L. Thompson, Dir., Div. of Supervision and Consumer Prot., *Testimony*
12 *Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate: Federal Deposit*
13 *Insurance Corporation on Mortgage Market Turmoil: Causes and Consequences*, Mar. 22, 2007,
14 *available at* <http://www.fdic.gov/news/news/speeches/chairman/spmar22071.html>.
15

16 69. Upon information and belief, in 2004, as interest rates began to climb, the pool of
17 potential prime borrowers looking to refinance began to dry up and lenders began extending
18 loans to subprime borrowers with troubled credit histories in an effort to maintain or grow
19 market share in a declining origination environment.
20

21 70. To take advantage of this new market, lenders weakened their underwriting
22 standards, including:

- 23 (a). reducing the minimum credit score borrowers need to qualify for certain
24 loans;
25 (b). allowing borrowers to finance a greater percentage of a home's value or to
26 carry a higher debt load;

(c). introducing new products designed to lower borrowers' monthly payments for an initial period; and

(d). allowing borrowers to take out loans with little, if any, documentation of income and assets.

See Ruth Simon, *Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep Relaxing Credit-Score, Income and Debt-Load Rules*, Wall St. J., July 26, 2005, at D1.

71. In addition to lowering underwriting standards, lenders introduce new loan products, which enticed borrowers but also put them at greater risk of default:

(a). **No-documentation and low-documentation loans:** Known in the industry as “liar loans,” the practice of requiring little or no documentation from borrowers constituted as much as 40 percent of subprime mortgages issued in 2006, up from 25 percent in 2001. See Gretchen Morgenson, *Crisis Looms In Mortgages*, N.Y. Times, Mar. 11, 2007.

(b). **Piggy-back loans:** These combine a mortgage with a home-equity loan or line of credit, allowing borrowers to finance more than 80 percent of the home's value without paying for private mortgage insurance. As of 2006, about half of all subprime loans included “piggyback” loans, and on average all borrowers financed 82 percent of the underlying value of their property, markedly up from 48 percent in 2000. See *Id.*; James R. Hagerty & Ruth Simon, *Home Lenders Pare Risky Loans – More Defaults Prompt Cut in ‘Piggyback’ Mortgages; Housing Market May Suffer*, Wall St. J., Feb. 14, 2007, at A3.

(c). **Interest-only mortgages:** These allow borrowers to pay interest and no principal in the loan's early years, which keep payments low for a time, but

1 require that the deferred payment of principal be made in the future through
2 increased monthly or balloon payments.

3 (d). **Option adjustable-mortgages:** The most prevalent of which are hybrid
4 adjustable rate mortgages (“ARMs”), the loans are marketed with promotional or
5 “teaser” rates during the loan’s introductory period that later balloon to much
6 higher rates once the introductory period has ended. ARMs currently account for
7 between one-half and one-third of subprime mortgages. See Testimony of Roger
8 T. Cole, Director, Division of Banking Supervision and Regulation, The Federal
9 Reserve Board, *Mortgage Markets*, Before the Committee on Banking, Housing
10 and Urban Affairs, U.S. Senate, Mar. 22, 2007, available at
11 <http://www.federalreserve.gov/boarddocs/testimony/2007/20070322/default.htm>.
12

13 3. The Fall of the Subprime Lending Industry.

14 72. As early as 2004, industry watchdogs began expressing growing fears that relaxed
15 lending practices were increasing risks for borrowers and lenders in overheated housing markets.
16 See Simon, *Mortgage Lenders*, *supra*. As lenders made it easier for borrowers to qualify for a
17 loan by such practices as described above, they were also greatly increasing the likelihood that
18 borrowers would be unable to make payments, and that defaults would rise. Of particular
19 concern was the prevalence of adjustable-rate loans, which, in combination with the lowered
20 lending standards, were more likely to result in borrowers’ early payment defaults.
21

22 73. In May 2005, bank regulators issued their first-ever guideline for credit-risk
23 management for home-equity lending and, in December 2005, new guidelines for mortgage
24 lenders were issued as well. *Id.*; Testimony of Sandra L. Thompson, *supra*. The proposed
25 “Interagency Guidance on Nontraditional Mortgage Product Risks” sent a clear message to the
26

1 marketplace that bank regulators were concerned about the lessened underwriting standards and
2 general lax risk management practices of subprime lenders.

3 74. In 2005 and 2006, the Federal Reserve instituted a series of interest rate hikes and
4 the interest rates on variable rate loans, including mortgage loans, began to rise. Subprime
5 borrowers who were able to afford the initially low "teaser rate" loan payments no longer could
6 meet their monthly payment obligations. At the same time, home values began to decline
7 sharply, leading some borrowers to walk away from loans when they could not afford the
8 increased monthly mortgage and could not readily re-sell the property for a profit. As a result,
9 many borrowers no longer paid their mortgages, causing defaults to increase significantly.
10

11 75. As of mid-2005, delinquency rates for subprime loans (60-days or more past due)
12 rose for the first time since 2002. By the fourth quarter of 2005, delinquencies and foreclosures
13 began to rise even more severely -- as of October 2005 the delinquency rate was twice that
14 recorded on new subprime loans a year earlier. *See Simon & Hagerty, More Borrowers, supra.*
15

16 76. According to the FDIC, total subprime delinquencies rose from 10.33 percent in
17 the fourth quarter of 2004 to 13.33 percent in the fourth quarter of 2006 and foreclosures rose
18 from 1.47 percent to 2.0 percent over the same period. Testimony of Sandra L. Thompson,
19 *supra.*
20

21 77. AMR subprime loans accounted for the largest rise in delinquency rates, an
22 increase from 9.83 percent to 14.44 percent between the fourth quarter of 2004 and the fourth
23 quarter of 2006; whereas foreclosures rose from 1.5 percent to 2.7 percent during the same
24 period. *Id.*

25 78. In 2006 alone, roughly 80,000 subprime borrowers fell into delinquency, many
26 shortly after origination. *See Simon & Hagerty, More Borrowers, supra.*

79. The imminent collapse of the subprime lending industry was widely-documented. In December 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market. Ron Nixon, *Study Predicts Foreclosure For 1 In 5 Subprime Loans*, N.Y. Times, Dec. 20, 2006. Shortly after, several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries from SEC and FDIC, and resulting in several bankruptcy filings.

4. WaMu Engaged in Risky and Inappropriate Subprime Lending Practices and Serious Mismanagement.

80. Despite the many warnings issued by industry analysts and government regulators, as well as other negative indicators, such as rising interest rates and a cooling housing market, for much of the Class Period, WaMu continued to engage in risky and inappropriate lending practices and to make inaccurate prognostications about its financial future.

a. WaMu Shifts Its Focus to the High-Risk Subprime Market.

81. During the real estate industry's rapid growth from 2002 - 2005, WaMu grew its mortgage business substantially, recording record levels of revenue in 2005. However, WaMu, which sold its direct subprime lending business to Citigroup in 2003, was late to expand into the subprime lending business.

82. WaMu's subsidiary, Long Beach Mortgage, experienced strong growth in the subprime lending market, which prompted WaMu executives to target the broader subprime market for expansion.

83. In its 2005 Annual Report, WaMu announced that:

The Company remains committed to the subprime mortgage market and intends to increase the loan volume of its subprime mortgage business, Long Beach Mortgage Company, and to maintain the size of its purchased subprime home loan portfolio. A portion of the Company's Card Services portfolio is made up of subprime credit card loans and Card Services may

1 continue to originate a portion of its credit card loans to subprime
2 borrowers. If unemployment were to rise or either a slowdown in housing
3 price appreciation or outright declines in housing prices were to occur,
4 subprime borrowers, who tend to have greater vulnerability to such
5 changes than prime borrowers, may be unable to repay their loans and the
6 credit performance of the Company's subprime portfolios could suffer,
7 with a potential adverse effect on earnings.

8 2005 Form 10-K at 4.

9 84. Even then, industry observers questioned both the efficacy and timing of WaMu's
10 decision to make subprime lending a prominent part of its business operations. As *The Seattle*
11 *Times* reported in November 2005:

12 For anyone who thinks of Washington Mutual as a buttoned-down bank
13 dishing up only plain-vanilla loans, meet Long Beach Mortgage.

14 The WaMu subsidiary is one of the country's largest lenders to people
15 with damaged credit.

16 That's not the kind of business most folks associate with WaMu, a
17 conservative institution with roots in the meat-and-potatoes thrift industry.
18 By dipping into subprime lending – a term that refers to borrowers who
19 can't get best, or prime, rate – WaMu has moved into an arena that was
20 once dominated by specialty lenders, such as Household Finance and The
21 Money Store.

22 ***

23 Long Beach made more than a quarter of all WaMu home-purchase loans
24 last year, and [CEO] Killinger wants the business to grow faster than
25 WaMu's traditional mortgage lending.

26 For one thing, it's more profitable.

"We earn better margins in the subprime business because we're very
efficient and have an advantage over some competitors," he said.

That does not appease analysts who worry about what will happen when
interest rates go up and borrowers have a harder time making payments.

"I hate the business," said Richard Bove, an analyst with Punk, Ziegel &
Co. "Asking people who can't afford to buy something to pay up to buy
that product is a concept that, for me, doesn't work."

1 Long Beach is one of the top 10 subprime mortgage lenders in the country
 2 and growing fast. It made loans of \$8.4 billion in the third quarter, more
 3 than twice its volume a year earlier. And it has added about 900 of its
 2,500 employees in the past year.

4 WaMu sells many of Long Beach's loans to investors, and it buys
 5 subprime mortgages from other lenders as investments. About 10 percent
 of the loans in its portfolio at the end of the quarter were subprime.

6 Robert Napoli, an analyst at Piper Jaffray, asked executives on a recent
 7 conference call why they want to expand the subprime area.

8 "It seems that margins in the industry are, for the most part, at record
 9 lows, so it seems that maybe this isn't the best time to be aggressively
 growing the business," Napoli said.

10 Melissa Allison and Justin Mayo, *WaMu Has Stake In Risky, Sub-Prime Arena*, The
 11 Seattle Times, Nov. 13, 2005.

12 85. WaMu decided to expand its subprime business despite the cooling housing
 13 market and despite the fact that the subprime lending is a notoriously dodgy segment of the
 14 mortgage industry. In fact, prior to its acquisition by WaMu, Long Beach Mortgage had been
 15 sued by the United States Department of Justice for violations of the Fair Housing Act and
 16 related discriminatory practices. *See* Settlement Agreement, Sept. 5, 1996, *available at*
 17 <http://www.usdoj.gov/crt/housing/documents/longbeachsettle.htm>.

18 86. Turnover of key personnel exacerbated the risk posed by WaMu's increased
 19 exposure to subprime. In November 2005, WaMu announced the retirement of its Chief
 20 Enterprise Officer, James Vanasek. *See* Current Report (Form 8-K) (Nov. 2, 2005) at Ex. 99.1.
 21 Then, in late December 2005, WaMu announced a dramatic re-alignment of its subprime lending
 22 oversight, and that Craig Chapman, then-president of the group responsible for overseeing
 23 subprime, would leave WaMu in January 2006. WaMu touted the operating efficiencies that this
 24 shift would produce and assured investors that "we have a strong and experienced leadership
 25 team that recognizes the unique characteristics of the subprime business." *See* Current Report
 26

1 (Form 8-K) (Dec. 21, 2005) at Ex. 99.1.

2 87. Despite these factors, WaMu consistently represented throughout the Class Period
3 that it had implemented and maintained adequate internal controls and sufficient risk
4 management strategies. See Quarterly Report (Form 10-Q) (June 30, 2006) at 59; Quarterly
5 Report (Form 10-Q) (Sept. 30, 2006) at 58; 2006 Form 10-K at 3.
6

7 88. During this period, WaMu dramatically increased both its origination of subprime
8 mortgages and its securitization and resale of those mortgages to other banks and investors. The
9 short-term revenue and profit gains appeared promising. In 2005, revenue from sales and
10 servicing of home mortgage loans grew to \$1.79 billion, compared with \$1.47 billion in 2004.
11 WaMu attributed the improved performance to increased sales of the Company's Option ARM
12 product. See Current Report (Form 8-K) (Jan. 18, 2006) at Ex. 99.1.
13

14 89. The Company's 2005 results also showed that mortgage-lending boom had run
15 out of steam. Revenue from sales and servicing of home mortgage loans, mortgage sales and
16 servicing revenue fell from \$497 million in the third quarter to only \$264 million in the fourth
17 quarter. *Id.* Despite the declining revenue and deteriorating market conditions, including a
18 cooling market and interest rate increases, WaMu chose to expand its subprime operations, as
19 alleged *supra*.
20

21 **5. WaMu Continued to Offer Subprime Loans Despite the High Risk of**
22 **Default or Foreclosure.**

23 90. Even after the risks of subprime lending were indisputably known, WaMu
24 continued to extend subprime loans to borrowers which contained many of the weakened lending
25 terms discussed in Section VII(A)(2), *supra*. WaMu's aggressive marketing of these loans
26 resulted in massive increases in loan delinquencies and foreclosures and put the financial health

1 of the Company in jeopardy.

2 91. For every quarter since Q2 2006, WaMu has ranked as one of the largest
3 subprime lenders in the country. See Nat'l Mortgage News Online, available at
4 <http://data.nationalmortgagenews.com>.

5 92. Not until early 2007 did WaMu begin to acknowledge the dire consequences of its
6 risky business practices, as management publicly recognized the impact of the deteriorating
7 housing market on its business and increased its forecast for losses due to loans.

8 93. The *Wall Street Journal* reported on what would become a quarterly habit, the
9 Company's substantially increasing its forecast for loan losses:

10
11 WaMu's mortgage unit was hit hard by the slowing housing market. The
12 thrift's subprime mortgage business, which lends to customers with
13 blemished credit, was hurt as more borrowers struggled to make their
14 payments and more loans became delinquent.

15 "Subprime encountered significant difficulties," Chief Executive Kerry
16 Killinger said, citing a mix of a slowing housing market, overcapacity in
17 the sub-prime mortgage-origination industry and credit deterioration.

18 The Seattle bank now forecasts that its overall provision for loan and
19 credit-card losses this year would reach between \$1.1 billion and \$1.2
20 billion, up from the \$850 million to \$950 million it had projected in
21 October. In addition to worsening subprime credit quality, WaMu also
22 attributed the increase to an accounting change for credit-card loans held
23 for sale, among other factors. But management stressed that its credit-card
24 portfolio has performed very well.

25 Ann Carrns, *Earnings Digest: WaMu Net Rises On Sale of Unit; Revenue Declines*, Wall
26 St. J., Jan. 18, 2007.

94. On January 18, 2007, WaMu's stock price closed at \$44.26 per share.

95. The results of WaMu's aggressive and risky lending practices came in sharper
focus two months later, when the Company issued its Annual Report, which detailed the marked
increase in delinquencies and loan foreclosures for the subprime loans the Company was

1 servicing. 2006 Form 10-K (Dec. 31, 2006).

2 96. In April, WaMu announced a 20% decline in first quarter profit and once again
3 revised its estimated losses due to bad loans – this time nearly tripling its estimate for loan
4 losses. The *Wall Street Journal* reported:

5 Washington Mutual Inc., taking a beating from the cratering subprime-
6 mortgage sector amid a housing downturn, said first-quarter profit fell
7 20%.

8 The Seattle thrift, the largest U.S. savings and loan by stock-market value,
9 nearly tripled its provision for loan losses, to \$234 million from \$82
10 million, as its home-loans business swung to a loss of \$113 million from a
11 profit of \$52 million a year ago.

12 Chief Executive Kerry Killinger said the thrift has curtailed its subprime-
13 mortgage lending by 51% from the prior-year quarter to reduce its
14 exposure. The thrift also stopped buying mortgages from smaller
15 "correspondent" lenders be-cause it has less control over loan
16 underwriting in that business.

17 WaMu ranked 11th last year in originating subprime mortgages, as home
18 loans to borrowers with weak credit are called, according to Inside
19 Mortgage Finance, a Bethesda, Md., industry newsletter.

20 Also, among the top-five U.S. home-mortgage lenders, WaMu last year
21 made the highest percentage of loans to investors or second-home buyers,
22 according to a Wall Street Journal analysis of data filed with banking
23 regulators. Such loans are generally considered riskier than those to
24 owner-occupants.

25 "Our home-loans business was challenged during the first quarter by
26 difficult market conditions," Mr. Killinger said in a statement. He said the
steps taken so far should position the thrift to grow as the market
improves.

27 Ann Carrns, *Earnings Digest: Washington Mutual Earnings Slide on Home-Loan Losses*,
28 Wall St. J., Apr. 18, 2007.

29 97. Defendant Killinger attempted to assure investors:

30 "Over the past 12 months, we have taken a number of prudent actions to
31 reduce our exposure to the subprime mortgage industry," Mr. Killinger
32 said in a statement. "These actions, along with a diversified business mix,

1 limited our exposure to the mortgage market's downturn and position us
2 well to expand and grow as market conditions improve.”

3 *Bad Loans Inhibit Profits At Three Regional Banks*, Associated Press, Apr. 18, 2007.

4 98. Killinger also opined that the mortgage crisis presented WaMu with an
5 opportunity:

6 With a number of competitors going out of business, we're now able to
7 have better pricing, and the credit quality of the loans being originated
8 thus far in '07 is significantly better than in '06....It's too early to declare
9 victory, but we are seeing encouraging signs.

10 Amy Martinez, *Subprime Fallout Hits WaMu*, The Seattle Times, Apr. 18, 2007.

11 99. Defendant Killinger reiterated his positive outlook in July 2007, when he
12 announced his expectation that the Company's home loans group would return to profitability.
13 *WaMu Beats Forecasts With 8.2% Profit Gain*, The Seattle Times, July 18, 2007. In fact, the
14 full extent of WaMu's exposure to the mortgage market's downturn had yet to be disclosed.

15 100. Just one month after Killinger's assurance, the Company acknowledged that
16 liquidity had diminished significantly in the market for subprime-backed securities. WaMu's
17 share price lost 2.2 percent of its value, falling to \$35.95 per. *WaMu's Shares Decline on*
18 *Mortgage Woes*, The Seattle Times, Aug. 11, 2007.

19 101. Despite the constant stream of negative results relating to its subprime operations,
20 WaMu continued to write the riskiest subprime loans as late as July 2007. Defendant Killinger
21 acknowledged so during an interview with reporters at *San Francisco Chronicle*:

22 But at significantly lower volumes. We tried to reduce our participation.
23 The conclusion we have made is that the slowdown in housing prices and
24 the risk of the housing market have increased this year, making the 2/28
25 and 3/27 products less appropriate than they'd been in the past. Those
26 products worked well when housing prices were continuing to increase.

Interview with Kerry Killinger, San Francisco Chronicle, Aug. 12, 2007.

102. Killinger also admitted that lending standards had deteriorated during the subprime boom:

Q: Why would anyone make a stated-income loan in the first place? Why would a practice like that become the norm?

Q: From competitive pressures, from significant excess of capital flooding into the business from Wall Street. That's really what it was. Severe competitive pressure leading to a loosening of underwriting standards for the industry.

Id.

103. On September 10, 2007, Defendant Killinger spoke at the Lehman Brothers 2007 Financial Services Conference and assured the market that WaMu had positioned itself "to be a successful in what is rapidly *becoming* a challenging business environment." *See* Current Report (Form 8-K) (Sept. 13, 2007) at Ex. 99.1.

104. Defendant Killinger lauded, among other things, the quality of loans held in the Company's investment portfolio. On a powerpoint slide, he assured investors that 82% of WaMu's home loans, including those made through the subprime mortgage channel, had loan-to-value ratios of less than 80%. *Id.* at Slide 12.

105. Two days later, WaMu announced that it was shuttering its erstwhile subprime juggernaut, Long Beach Mortgage. Matthew Padilla, *Washington Mutual Shutting Down Anaheim Subprime Unit*, The Orange County Register, Sept.14, 2007.

106. WaMu's belated efforts to rein in its subprime business could not mitigate the impact of its subprime binge. On October 5, 2007, WaMu announced a 75% drop in third-quarter profit.

The other shoe dropped Friday for Washington Mutual, as the giant Seattle-based thrift said the collapsed housing and mortgage markets will lead to a 75 percent drop in third-quarter profit.

1 ***

2 As the nation's housing bubble has deflated, WaMu's stockpile of
3 delinquent loans, foreclosed properties and other non-performing assets
4 has risen – both in absolute terms, to more than \$4 billion, and as a share
of its total assets, to 1.3 percent, as of June 30.

5 Drew DeSilver, *WaMu Forecasts Big Drop in Profit*, The Seattle Times, Oct. 6, 2007.

6 **a. WaMu Concealed the Fact That Its Subprime Origination Practices**
7 **Artificially Inflated the Value of Its Loans.**

8 107. On November 1, 2007, WaMu's woes were exacerbated, when New York State
9 Attorney General Andrew Cuomo filed suit against First American Corp. ("First American"),
10 alleging that it had conspired with WaMu to artificially inflate property appraisals in connection
11 with WaMu's origination of loans (hereinafter the "Attorney General Suit"). *Available at*
12 <http://www.oag.state.ny.us/press/2007/nov/EA%20Complaint.pdf>.

13 108. The Attorney General Suit alleges that, beginning in July 2006, WaMu pressured
14 First American and its affiliates to use certain "preferred appraisers" and that First American
15 responded by allowing "WaMu's loan production staff to hand-pick appraisers who bring in
16 appraisal values high enough to permit WaMu's loans to close, and improperly permits WaMu to
17 pressure [] appraisers to change values that are too low to permit loans to close...." *Id.* at ¶ 8.

18 109. The inflation of the property appraisals not only permitted WaMu to write loans
19 in circumstances where none should have been written, but also, by falsifying the key Loan-to-
20 Value ratio, permitted WaMu's inflation of the value of those loans whether kept as
21 investments or securitized and sold to third parties. As WaMu explains in its Annual Report:

22 Loan-to-value ratios are a key determinant of future performance. Home
23 loans with loan-to-value ratios of greater than 80 percent at origination
24 without private mortgage insurance or government guarantees expose the
25 Company to greater credit risk than home loans with loan-to-value ratios
26 of 80 percent or less at origination. This greater credit risk arises because,

1 in general, both default risk and the severity of loss is higher when
2 borrowers have less equity to protect in the event of foreclosure.

3 2006 Form 10-K.

4 110. Put differently, not only did WaMu dramatically alter its risk exposure though
5 increasing its subprime lending exposure, it also purposefully exposed itself to higher risk loans
6 and more severe loss – without disclosing so – by participating in the manipulation of the
7 origination process.

8 111. In addition the potential liability for violating state and federal laws, these
9 fraudulent practices pose grave danger to WaMu's financial condition. With regard to affected
10 loans that were sold to third-parties, WaMu is susceptible to the forced re-purchase of the loan
11 due to its breach of warranties regarding the loan's origination process or subsequent
12 performance.

13
14 112. As set forth in the Company's Annual Report:

15 In the ordinary course of business, the Company sells loans to third parties
16 and in certain circumstances ... retains credit risk exposure on those loans.
17 The Company may also be required to repurchase sold loans when
18 representations and warranties made by the Company in connection with
19 those sales are breached.

20 *Id.*

21 113. WaMu fares little better with regard to those loans it has kept as its own
22 investments. Discovery of the revised Loan-to-Value ration requires that WaMu recalculate the
23 value of the asset in its own portfolio. The heightened risk profile of the loans also means that
24 WaMu has insufficient reserves for loan losses.

25 114. On the heels of this news, WaMu's stock price plummeted further, closing at
26 \$20.04 per share, its lowest closing price in seven years. Jessica Mintz, *Tough Looking 2008*
Sinks WaMu Shares, Associated Press, Nov. 7, 2007.

6. Throughout the Class Period, WaMu Failed to Sufficiently Reserve for Various Liabilities and Obligations Related to Mortgages that it Securitized or Sold.

115. Even absent its participation in the manipulation of appraisals, WaMu's financial statements throughout the period failed to reflect the actual liabilities and losses to which the Company was exposed.

116. As the credit squeeze tightened and mortgage woes escalated through late 2006 and into early 2007, WaMu failed to disclose and account for the increased risks it faced as a result. The Company allocates allowances for loan and lease losses, and, as a specialized subprime lender, WaMu expressly allocates allowances for losses from its subprime mortgage channel. But as the subprime crisis loomed over the mortgage market, WaMu allocated *less* for both general loan and lease losses and losses in its subprime mortgage channel in December 31, 2006 than it did in the prior year ending December 31, 2005 as demonstrated in the following chart prepared by WaMu:

	December 31,								
	2006			2005			2004		
	Allowance	Allocated	Loan	Allowance	Allocated	Loan	Allowance	Allocated	Loan
	for Loan	as a %	Category	for Loan	as a %	Category	for Loan	as a %	Category
	and	of Loan	as a %	and	of Loan	as a %	and	of Loan	as a %
	Lease	Category	of Total	Lease	Category	of Total	Lease	Category	of Total
	Losses		Loans ⁽¹⁾	Losses		Loans ⁽¹⁾	Losses		Loans ⁽¹⁾
(dollars in millions)									
Allocated allowance:									
Loans secured by real estate:									
Home loans ⁽²⁾	\$ 202	0.20%	44.22%	\$ 222	0.19%	49.71%	\$ 214	0.19%	53.10%
Home equity loans and lines of credit ⁽³⁾	184	0.35	23.51	106	0.21	22.14	83	0.19	21.08
Subprime mortgage channel ⁽⁴⁾	326	1.57	9.23	374	1.77	9.21	243	1.27	9.26
Home construction ⁽⁵⁾	5	0.24	0.93	6	0.29	0.89	12	0.51	1.13
Multi-family	85	0.28	13.41	122	0.48	11.15	101	0.45	10.76
Other real estate	54	0.80	2.99	69	1.57	2.19	116	2.05	2.54
Total allocated allowance secured by real estate	856	0.40	94.29	899	0.41	95.29	769	0.38	98.07
Consumer:									
Credit card	308	4.68	4.83	328	4.08	3.50	-	-	-
Other	7	2.32	0.12	27	4.25	0.28	36	4.55	0.38
Commercial	45	2.64	0.76	44	2.03	0.93	51	1.59	1.55
Total allocated allowance held in portfolio	1,416	0.63	100.00	1,298	0.57	100.00	856	0.41	100.00
Unallocated allowance	214	0.09	-	397	0.17	-	445	0.22	-
Total allowance for loan and lease losses	\$1,630	0.72%	100.00%	\$1,695	0.74%	100.00%	\$1,301	0.63%	100.00%

2006 Form 10-K at 61.

117. WaMu retains subordinated interests in mortgages that it securitizes and makes representations to buyers about performance and other characteristics of mortgages that it sells. The Company's Quarterly Reports for 2007 reveal that WaMu under-reserved for credit risk arising from its retained subordinated interests and understated liabilities arising from representations it made regarding sold mortgages.

118. For instance, between March 31, 2007 and September 30, 2007 the Company increased its recorded reserves and liabilities despite a substantial *decrease* of the related assets or revenue. From March 31, 2007 to September 30, 2007 WaMu's subordinated interests decreased from \$2.71 billion to \$2.29 billion; during the same period, its allowance for loan and lease losses mushroomed from \$1.54 billion to \$1.89 billion, an increase of more than 20% despite the decrease in subordinated interests. *See* Quarterly Report (Form 10-Q) (Mar. 31, 2007) and Quarterly Report (Form 10-Q) (Sept. 30, 2007).

119. WaMu's need to increase its loan loss provisions demonstrates that its previously announced earnings and equity were inflated and did not properly account for the actual condition of the Company's loan holdings.

7. WaMu's Financial Problems Come to Light.

120. On October 17, 2007, WaMu officially reported its third-quarter results and dropped another bombshell regarding its losses on loans.

If you think the worst is over for mortgage lenders, a close look at Washington Mutual's balance sheet should dispel that notion pretty quickly. The largest U.S. savings and loan stunned investors Oct. 17 when it said it would set aside as much as \$1.3 billion this quarter to cover anticipated loan losses. The news came the same day Seattle-based WaMu announced a 72 percent drop in third-quarter profit to \$210.

Since then, its stock has fallen 28 percent.

1 But the real wonder is that WaMu's forecast for fourth-quarter loan-loss
2 provisions wasn't substantially higher.

3 Jonathan Weil, *Mortgage Mess Hitting WaMu Hard*, Bloomberg News, Nov. 4, 2007.

4 121. According to *Bloomberg's* Weil and other finance commentators, WaMu still has
5 not come clean on its full exposure to risky subprime loans. Weil noted that WaMu's third-
6 quarter "balance sheet maneuvers are a classic case of earnings management." Jonathan Weil,
7 *Countrywide, WaMu Play Shell Games*, Bloomberg News, Nov. 4, 2007. WaMu shifted \$17
8 billion of loans to its investment portfolio, which permitted it to avoid accounting for them based
9 on their current market value. According to Weil: "While the distinction may look arbitrary, the
10 effect on short-term earnings under the accounting rules can be huge when loan values are
11 falling, as they are now." *Id.*

12
13 122. On the basis of the Company's third-quarter results, financial analysts have
14 panned WaMu. Between October 18 and October 22, four analysts downgraded the stock.
15 Lehman Brothers analyst Bruce Harting estimated WaMu's loan losses for 2008 at \$5 billion for,
16 topping his original estimate of \$3.8 billion. Jessica Mintz, *Tough Looking 2008 Sinks WaMu*
17 *Shares*, Associated Press, Nov. 7, 2007.

18
19 123. The Company's earnings management and incremental disclosure of its loan loss
20 exposure has failed to satisfy investors. The stock, which traded above \$40 a share as recently as
21 June, fell to \$19.39 on November 8, 2007. As a local Seattle columnist noted:

22 At the close of trading Wednesday, WaMu stock finished at \$20.04 a
23 share. That's grim enough when put in historical context. That was the
24 lowest price since June 2000.

25 It's even worse with a considerably shorter horizon. WaMu peaked at
26 \$46.55 in November 2003. As recently as June this year, you could have
paid \$44.41 a share.

1 And it really gets ugly when looking back a few days. On Wednesday,
2 WaMu's stock dropped 17 percent from its Tuesday close, down \$4.19 a
3 share; at one point during the trading day, it was actually below \$20 a
4 share.

5 To sum up: In less than six months, WaMu has seen more than half of its
6 stock price melt away.

7 Bill Virgin, *WaMu Executives Try to Rally Investors, Meet Skepticism*, Seattle Post-
8 Intelligencer, Nov. 7, 2007.

9 124. Over the course of the Class Period, WaMu shares tumbled from \$46.42 to
10 \$18.30, a decline of 60 percent. As of November 19, 2007, WaMu shares were trading at their
11 lowest prices in over seven years.

12 **B. Defendants Knew or Should Have Known That WaMu Stock Was an Imprudent**
13 **Investment.**

14 125. During the Class Period, as described herein, Defendants knew or, had they
15 properly discharged their fiduciary obligations, would have known that WaMu stock was an
16 imprudent investment for the Plan due to WaMu's serious mismanagement and improper
17 business practices, including, among other practices, the Company's: (1) increasingly risk-
18 fraught lending practices; (2) lack of adequate risk-management controls over its improper
19 lending practices contributing to high delinquency and foreclosure rates among borrowers; (3)
20 role in the systematic inflation of property appraisals during the loan origination process; and (4)
21 misrepresentations regarding the Company's financial condition.

22 126. As a result, WaMu's stock price and the price of the Fund were artificially
23 inflated making them an imprudent investment for the Plan.

24 127. As a result of Defendants' knowledge of the public misconceptions concerning the true
25 financial health of the Company, any generalized warnings of market and diversification risks that
26 Defendants made to the Plan's participants regarding the Plan's investment in WaMu stock did not

1 effectively inform the Plan's participants of the past, immediate, and future risks of investing in
2 Company stock.

3 128. Defendants also failed to take into account the changing risk profile of the WaMu
4 stock investment as a result of the above circumstances and the Company's deteriorating
5 financial circumstances as demonstrated by objective indicators for evaluating a company's
6 ongoing viability.
7

8 129. The Defendants failed to conduct an appropriate investigation into whether WaMu
9 stock was a prudent investment for the Plan and, in connection therewith, failed to provide the Plan's
10 participants with information regarding WaMu's tremendous problems so that participants could make
11 informed decisions regarding their investments in the Plan.
12

13 130. An adequate or even cursory investigation by Defendants would have revealed to a
14 reasonable fiduciary that, under these circumstances, investment by the Plan in WaMu stock was
15 excessively and unduly risky, and, thus, imprudent. A prudent fiduciary acting under similar
16 circumstances would have acted to protect participants against unnecessary losses and would have
17 made different investment decisions. Such action was particularly appropriate here since the Plan did
18 not require the fiduciaries to offer WaMu stock as a Plan investment option, or maintain any investment
19 in the stock.
20

21 131. Because Defendants knew or should have known that WaMu was not a prudent
22 investment option for the Plan, they had a fiduciary duty to protect the Plan and its participants from
23 unreasonable and entirely predictable losses incurred as a result of the Plan's investment in WaMu
24 stock.
25

26 132. Defendants had available to them several different options for satisfying this duty,
including: making appropriate public disclosures, as necessary; divesting the Plan of WaMu stock;

1 discontinuing further contributions to and/or investment in WaMu stock under the Plan; consulting
 2 independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve
 3 the participants of the Plan; and/or resigning as fiduciaries of the Plan to the extent that as a result of
 4 their employment by WaMu they could not loyally serve the Plan and its participants in connection
 5 with the Plan's acquisition and holding of WaMu stock.
 6

7 133. Despite the availability of these and other options, Defendants failed to take any action
 8 to protect participants from losses resulting from the Plan's investment in WaMu stock. In fact,
 9 Defendants continued to invest and to allow investment of the Plan's assets in Company stock even as
 10 WaMu's problems came to light.

11 134. In addition, the Defendants failed to adequately review the performance of the other
 12 fiduciaries of the Plan to ensure that they were fulfilling their fiduciary duties under the Plan and
 13 ERISA.
 14

15 135. When it came to their own personal holdings of WaMu stock, however, several
 16 defendants, including Killinger, sold millions of dollars of the stock, effectively cashing in while
 17 hanging Plan participants out to dry. Such conduct violated the duties of prudence and loyalty under
 18 ERISA.
 19

20 **C. Defendants Failed to Provide Plan Participants with Complete and Accurate
 Information about the True Risks of Investment in WaMu Stock in the Plan.**

21 136. ERISA mandates that plan fiduciaries have a duty of loyalty to the plan and its
 22 participants which includes the duty to speak truthfully to the plan and its participants when
 23 communicating with them. A fiduciary's duty of loyalty to plan participants under ERISA
 24 includes an obligation not to materially mislead, or knowingly allow others to materially
 25 mislead, plan participants and beneficiaries.
 26

137. During the Class Period, upon information and belief, Defendants made direct and

1 indirect communications with participants in the Plan which included statements regarding
 2 investments in Company stock. These communications included, but were not limited to, SEC
 3 filings, annual reports, press releases, and Plan documents, in which Defendants failed to
 4 disclose that Company stock was not a prudent retirement investment, and which were
 5 incorporated by reference in Plan documents. The Company regularly communicated with
 6 employees, including participants in the Plan, about the performance, future financial and
 7 business prospects of the Company's common stock, which was, far and away, the single largest
 8 asset of the Plan. 2006 Form 11-K at 10.

10 138. Defendants, as the Plan's fiduciaries, knew or should have known certain basic
 11 facts about the characteristics and behavior of the Plan's participants, well-recognized in the
 12 401(k) literature and the trade press, concerning investment in company stock, including that:

- 14 (a). Employees tend to interpret a match in company stock as an endorsement
 15 of the company and its stock;
- 16 (b). Out of loyalty, employees tend to invest in company stock;
- 17 (c). Employees tend to over-extrapolate from recent returns, expecting high
 18 returns to continue or increase going forward;
- 19 (d). Employees tend not to change their investment option allocations in the
 20 plan once made;
- 21 (e). No qualified retirement professional would advise rank and file employees
 22 to invest more than a modest amount of retirement savings in company stock, and
 23 many retirement professionals would advise employees to avoid investment in
 24 company stock entirely;
- 25 (f). Lower income employees tend to invest more heavily in company stock
 26

1 than more affluent workers, though they are at greater risk; and

2 (g). Even for risk-tolerant investors, the risks inherent to company stock are
3 not commensurate with its rewards.

4 139. Even though Defendants knew or should have known these facts, and even though
5 Defendants knew of the concentration of the Plan's funds in Company stock during the Class
6 Period, Defendants failed to take any meaningful ameliorative action to protect the Plan and its
7 participants from their heavy investment in an imprudent retirement vehicle, WaMu stock.

8 140. In addition, Defendants failed to provide participants, and the market as a whole,
9 with complete and accurate information regarding the true financial condition of the Company.
10 As such, participants in the Plan could not appreciate the true risks presented by investments in
11 Company stock and therefore could not make informed decisions regarding their investments in
12 Company stock in the Plan.
13

14 141. Specifically, Defendants failed to provide the Plan's participants with complete
15 and accurate information regarding WaMu's serious mismanagement and improper business
16 practices, including, among other practices, the Company's: (1) increasingly risk-fraught lending
17 practices; (2) lack of adequate risk-management controls over its improper lending practices
18 contributing to high delinquency and foreclosure rates among borrowers; (3) role in the
19 systematic inflation of property appraisals during the loan origination process; and (4)
20 misrepresentations regarding the Company's financial condition.
21

22 142. Even as late as September 2007, Defendant Killinger persisted in providing
23 inaccurate information that did not reflect the Company's exposure to subprime-related losses.
24 Speaking at the Lehman Brothers Financial Services conference, Killinger said:
25
26

As a policy, we don't provide interim updates to our earnings drivers between our quarterly earnings calls. However, the near-perfect storm in the housing and capital markets I spoke about will impact our second half performance and I want to give you my insights into what that may look like. Of course, we will be updating our earnings drivers during our third quarter earnings call next month. Given a weakening housing market, we do expect to see:

- o A continuation of the increase in nonperforming loans which could lead to a higher level of charge-offs in the coming quarters.

- o As a result of this, and in support of our loan portfolio growth, we expect that our loan loss provisioning for the year could be approximately \$500 million greater than the full-year guidance we gave in July of \$1.5 to \$1.7 billion.

See Current Report (Form 8-K) (Sept. 10, 2007) at Ex. 99.1.

143. Just as the July guidance was inaccurate, Defendant Killinger's estimate was off by nearly 30%. In just a month's time, the Company revised the loan loss provisioning up to between \$2.7 and \$2.9 billion. *Washington Mutual, Inc. Prepared Remarks for Third Quarter 2007 Earnings Conference Call*, Oct. 17, 2007, available at <http://investors.wamu.com/Cache/1001137714.PDF?o=3&O=PDF&iid=102028&fid=1001137714&D=&T=&Y=>.

144. Throughout the Class Period, the participants were not informed of the true risks of investing their retirement assets in the Plan in WaMu stock.

D. Defendants Suffered From Conflicts of Interest.

145. As ERISA fiduciaries, Defendants are required to manage the Plan's investments, including the investment in WaMu stock, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to resolve them promptly when they occur.

146. Conflicts of interest abound when a company that invests plan assets in company stock founders. This is because as the situation deteriorates, plan fiduciaries are torn between their duties as officers and directors for the company on the one hand, and to the plan and plan participants on the other. As courts have made clear “[w]hen a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions.” *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir.1992) (citation omitted). Here, Defendants breached this fundamental fiduciary duty.

147. Defendants failed to investigate whether to take appropriate and necessary action to protect the Plan, and instead, chose the interests of the Company over the Plan by continuing to offer WaMu stock as a Plan investment option, and maintain investment in WaMu stock in the Plan. Moreover, while certain Defendants, such as Defendant Killinger, dumped shares they personally held, they did nothing to protect the Plan from losses due to the Plan’s imprudent investment in WaMu stock.

VIII. THE RELEVANT LAW

148. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

149. ERISA § 409(a), 29 U.S.C. § 1109(a), “Liability for Breach of Fiduciary Duty,” provides, in pertinent part,

any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

1 150. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to
 2 seek equitable relief from defendants, including, without limitation, injunctive relief and, as
 3 available under applicable law, constructive trust, restitution, and other monetary relief.

4 151. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provides, in
 5 pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the
 6 interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to
 7 participants and their beneficiaries, and with the care, skill, prudence, and diligence under the
 8 circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
 9 matters would use in the conduct of an enterprise of a like character and with like aims.

10 152. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the
 11 duties of loyalty, exclusive purpose and prudence and are the “highest known to the law.” *Chao*
 12 *v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002). They entail, among other things:
 13

14 (a) The duty to conduct an independent and thorough investigation into, and to
 15 continually monitor, the merits of all the investment alternatives of a plan, including in this
 16 instance the Company Stock Fund, which invested in WaMu stock, to ensure that each
 17 investment is a suitable option for the plan;
 18

19 (b) The duty to avoid conflicts of interest and to resolve them promptly when they
 20 occur. A fiduciary must always administer a plan with an “eye single” to the interests of the
 21 participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan
 22 sponsor; and
 23

24 (c) The duty to disclose and inform, which encompasses: (1) a negative duty not to
 25 misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that
 26

1 silence might be harmful; and (3) a duty to convey complete and accurate information material to
 2 the circumstances of participants and beneficiaries.

3 153. ERISA § 405(a), 29 U.S.C. § 1105(a), "Liability for Breach by Co-Fiduciary,"
 4 provides, in pertinent part,
 5

6 In addition to any liability which he may have under any other provision
 7 of this part, a fiduciary with respect to a plan shall be liable for a breach of
 8 fiduciary responsibility of another fiduciary with respect to the same plan
 9 in the following circumstances:

10 (1) if he participates knowingly in, or knowingly undertakes to conceal, an
 11 act or omission of such other fiduciary, knowing such act or omission is a
 12 breach;

13 (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C.
 14 § 1104(a)(1), in the administration of his specific responsibilities which
 15 give rise to his status as a fiduciary, he has enabled such other fiduciary to
 16 commit a breach; or

17 (3) if he has knowledge of a breach by such other fiduciary, unless he
 18 makes reasonable efforts under the circumstances to remedy the breach.

19 154. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary
 20 responsibility. Because ERISA permits the fractionalization of the fiduciary duty, there may be,
 21 as in this case, several ERISA fiduciaries involved in a given issue, such as the role of company
 22 stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit
 23 their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The
 24 result would be a setting in which a major fiduciary breach could occur, but the responsible party
 25 could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary merely
 26 knows of a breach, a breach he had no connection with, he must take steps to remedy it:

[I]f a fiduciary knows that another fiduciary of the plan has committed a
 breach, and the first fiduciary knows that this is a breach, the first
 fiduciary must take reasonable steps under the circumstances to remedy
 the breach. . . . [T]he most appropriate steps in the circumstances may be
 to notify the plan sponsor of the breach, or to proceed to an appropriate

1 Federal court for instructions, or bring the matter to the attention of the
 2 Secretary of Labor. The proper remedy is to be determined by the facts
 3 and circumstances of the particular case, and it may be affected by the
 4 relationship of the fiduciary to the plan and to the co-fiduciary, the duties
 and responsibilities of the fiduciary in question, and the nature of the
 breach.

5 1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

6 155. Plaintiff therefore brings this action under the authority of ERISA § 502(a)(2) for
 7 relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of
 8 fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).
 9

10 **IX. ERISA § 404(c) DEFENSE INAPPLICABLE**

11 156. ERISA § 404(c) is an affirmative defense that provides a limited exception to
 12 fiduciary liability for losses that result from participants' exercise of control over investment
 13 decisions. In order for § 404(c) to apply, participants must in fact exercise "independent control"
 14 over investment decisions, and the fiduciaries must otherwise satisfy the numerous procedural
 15 and substantive requirements of ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations
 16 promulgated under it.

17 157. ERISA § 404(c) does not apply here for several reasons.

18 158. First, ERISA § 404(c) does not and cannot provide any defense to the fiduciaries'
 19 imprudent decision to select and continue offering WaMu stock as an investment option in the
 20 Plan as this is not a decision that was made or controlled by the participants. *See* Final Reg.
 21 Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans) ("Final
 22 404(c) Reg."), 57 Fed. Reg. 46906-01, 1992 WL 277875, at *46924 n.27 (Oct. 13, 1992)
 23 (codified at 29 C.F.R. pt. 2550) (noting that "the act of limiting or designating investment
 24 options which are intended to constitute all or part of the investment universe of an ERISA §
 25 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or
 26

express plan language, is not a direct or necessary result of any participant direction of such plan”).

159. Secondly, even as to participant-directed investment in WaMu stock, ERISA § 404(c) does not apply because Defendants failed to ensure effective participant control by providing complete and accurate material information to participants regarding WaMu stock. See 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (the participant must be provided with “sufficient information to make informed decisions”). As a consequence, participants in the Plan did not have informed control over the portion of the Plan’s assets that were invested in WaMu stock as a result of their investment directions, and the Defendants remain entirely responsible for losses that result from such investment.

160. Because ERISA § 404(c) does not apply here, the Defendants’ liability to the Plan, the Plaintiff and the Class (as defined below) for losses caused by the Plan’s investment in WaMu stock is established upon proof that such investments were or became imprudent and resulted in losses in the value of the assets in the Plan during the Class Period.

X. DEFENDANTS’ INVESTMENT IN WAMU STOCK IS NOT ENTITLED TO A PRESUMPTION OF PRUDENCE

161. Some courts have applied a presumption of prudence to decisions by plan fiduciaries to invest plan assets in company stock in plans that qualify as “ESOPs” under the Internal Revenue Code and rules of the Department of the Treasury promulgated thereunder. The presumption is based on the dual purpose of an ESOP to allow employee ownership on the one hand, and save for retirement on the other. *Moench v. Robertson*, 62 F.3d 553, 569, 571 (3d Cir. 1995) (explaining dual purpose of ESOP plans and adopting presumption of prudence to balance these concerns). “A plaintiff may then rebut this presumption of reasonableness by

1 showing that a prudent fiduciary acting under similar circumstances would have made a different
2 investment decision.” *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)

3 162. Here, even if a portion of the Plan is considered an ESOP, and a presumption of
4 prudence is applied to the Defendants’ decision to offer WaMu stock as a Plan investment
5 option, the presumption is overcome by the facts alleged here, including, among other
6 averments:
7

- 8 • A precipitous stock price decline from over \$46.42 to \$18.30 during the Class Period;
- 9 • Risk of imminent further collapse of the price of WaMu stock based on WaMu’s
10 practices as discussed in detail herein;
- 11 • The Company’s seriously deteriorating financial condition as well as Defendants’
12 conflicted status as discussed in detail herein;
- 13 • Serious, if not gross, mismanagement evidenced by, among other things;
 - 14 ▪ Expanding subprime mortgage origination even after widely-recognized
15 market conditions had already slowed revenue growth and exponentially
16 increased the risk of defaults and loan losses;
 - 17 ▪ Participating in the systematic manipulation of loan origination practices;
 - 18 ▪ Persistently failing to recognize, mitigate, and accurately disclose, the
19 Company’s enormous exposure to loan losses;
 - 20 ▪ Dishonest, misleading, and illegal actions as set forth above that caused
21 the price of WaMu stock to be artificially inflated; and
 - 22 ▪ Defendants’ conflicts of interest by which they held the Company’s
23 interests above those of Plan participants through their failure to take prompt and
24 effective action to prevent further loss of participants’ retirement savings.

1 163. The imprudence of continued investment by Defendants in WaMu stock during
2 the Class Period under the circumstances present here is recognized in Department of Labor
3 regulations:

4 [B]ecause every investment necessarily causes a plan to forgo other
5 investment opportunities, an investment will not be prudent if it would be
6 expected to provide a plan with a lower rate of return than available
7 alternative investments with commensurate degrees of risk or is riskier
than alternative available investments with commensurate rates of return.

8 29 C.F.R. 2509.94-1. Defendants had available to them investment alternatives to WaMu stock
9 that had either a higher rate of return with risk commensurate to WaMu stock or an expected rate
10 of return commensurate to WaMu stock but with less risk.

11 164. Based on these circumstances, and the others alleged herein, it was imprudent and
12 an abuse of discretion for Defendants to continue to make and maintain investment in WaMu
13 stock, and, effectively, to do nothing at all to protect the Plan from significant losses as a result
14 of such investment during the Class Period.

16 XI. CAUSES OF ACTION

17 A. **Count I: Failure to Prudently and Loyally Manage the Plan and Assets of the Plan**

18 165. Plaintiff incorporates by this reference the paragraphs above.

19 166. This Count alleges fiduciary breach against the following Defendants: WaMu
20 and the Investment Committee Defendants (the "Prudence Defendants").

21 167. As alleged above, during the Class Period the Prudence Defendants were named
22 fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within
23 the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by
24 the duties of loyalty, exclusive purpose, and prudence.
25
26

1 168. As alleged above, the scope of the fiduciary duties and responsibilities of the
 2 Prudence Defendants included, on information and belief, managing the assets of the Plan for the
 3 sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill,
 4 diligence, and prudence required by ERISA. The Prudence Defendants were directly responsible
 5 for, among other things, selecting prudent investment options, eliminating imprudent options,
 6 determining how to invest employer contributions to the Plan and directing the trustee regarding
 7 the same, evaluating the merits of the Plan's investments on an ongoing basis, and taking all
 8 necessary steps to ensure that the Plan's assets were invested prudently.

10 169. Yet, contrary to their duties and obligations under ERISA, the Prudence
 11 Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during
 12 the Class Period, these Defendants knew or should have known that WaMu common stock no
 13 longer was a suitable and appropriate investment for the Plan, but was, instead, a highly
 14 speculative and risky investment in light of the Company's serious mismanagement, dire
 15 financial circumstances, and the imminent risk of collapse of WaMu stock as a result thereof.
 16 Nonetheless, during the Class Period, these Defendants continued to offer WaMu stock as an
 17 investment option for participant contributions. They did so despite evidence that the Company
 18 was overexposed to the risks of subprime lending, including rapidly increasing defaults and
 19 corresponding loan losses, and that the price of WaMu stock was artificially inflated as a result
 20 of the failure of the Defendants to provide complete and accurate information to Plan participants
 21 and the market generally.

24 170. The Prudence Defendants were obliged to prudently and loyally manage all of the
 25 Plan's assets. However, their duties of prudence and loyalty were especially significant with
 26 respect to Company stock because: (a) company stock is a particularly risky and volatile

1 investment, even in the absence of company misconduct; and (b) participants tend to
2 underestimate the likely risk and overestimate the likely return of investment in company stock.
3 In view of this, the Prudence Defendants were obliged to have in place a regular, systematic
4 procedure for evaluating the prudence of investment in Company stock.

5
6 171. Moreover, the Prudence Defendants failed to conduct an appropriate investigation
7 of the merits of continued investment in WaMu stock even in light of the losses, the Company's
8 highly risky and inappropriate practices, and the particular dangers that these practices posed to
9 the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the
10 imprudence of continuing to make and maintain investment in WaMu stock under these
11 circumstances.

12
13 172. The Prudence Defendants' decisions respecting the Plan's investment in WaMu
14 stock described above, under the circumstances alleged herein, abused their discretion as ERISA
15 fiduciaries in that a prudent fiduciary acting under similar circumstances would have made
16 different investment decisions. Specifically, based on the above, a prudent fiduciary could not
17 have reasonably believed that further and continued investment of the Plan's contributions and
18 assets in WaMu stock was in keeping with the Plan settlor's expectations of how a prudent
19 fiduciary would operate.

20
21 173. The Prudence Defendants were obligated to discharge their duties with respect to
22 the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that
23 a prudent man acting in a like capacity and familiar with such matters would use in the conduct
24 of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C.
25 § 1104(a)(1)(B).

1 174. According to DOL regulations and case law interpreting this statutory provision, a
2 fiduciary's investment or investment course of action is prudent if (a) he has given appropriate
3 consideration to those facts and circumstances that, given the scope of such fiduciary's
4 investment duties, the fiduciary knows or should know are relevant to the particular investment
5 or investment course of action involved, including the role the investment or investment course
6 of action plays in that portion of the plan's investment portfolio with respect to which the
7 fiduciary has investment duties; and (b) he has acted accordingly.

8
9 175. Again, according to DOL regulations, "appropriate consideration" in this context
10 includes, but is not necessarily limited to:

- 11 • A determination by the fiduciary that the particular investment or investment
12 course of action is reasonably designed, as part of the portfolio (or, where
13 applicable, that portion of the plan portfolio with respect to which the fiduciary
14 has investment duties), to further the purposes of the plan, taking into
15 consideration the risk of loss and the opportunity for gain (or other return)
16 associated with the investment or investment course of action; and
17
18 • Consideration of the following factors as they relate to such portion of the
19 portfolio:
 - 20 ○ The composition of the portfolio with regard to diversification;
 - 21 ○ The liquidity and current return of the portfolio relative to the anticipated
 - 22 cash flow requirements of the plan; and
 - 23 ○ The projected return of the portfolio relative to the funding objectives of
 - 24 the plan.
 - 25
 - 26

1 176. Given the conduct of the Company as described above, the Prudence Defendants
 2 could not possibly have acted prudently when they continued to invest the Plan's assets in
 3 WaMu stock because, among other reasons:

- 4 • The Prudence Defendants knew of and/or failed to investigate the failures of the
 5 Company, including, but not limited to the following, which made the Company
 6 an extremely risky and imprudent investment for the Plan: (a) the Company's
 7 over reliance on subprime lending; (b) the Company's participation in the
 8 systematic manipulation of the loan origination process; (c) the Company's failure
 9 to implement and maintain risk management control processes; and (d) the
 10 Company's failure properly to account for its subprime lending business
 11 operations
 12
- 13 • The risk associated with the investment in WaMu stock during the Class Period
 14 was far above and beyond the normal, acceptable risk associated with investment
 15 in company stock;
 16
- 17 • This abnormal investment risk could not have been known by the Plan's
 18 participants, and the Prudence Defendants knew that it was unknown to them (as
 19 it was to the market generally), because the fiduciaries never disclosed it;
 20
- 21 • Knowing of this extraordinary risk, and knowing the Plan's participants did not
 22 know it, the Prudence Defendants had a duty to avoid permitting the Plan or any
 23 participant from investing the Plan's assets in WaMu stock; and
 24
- 25 • Further, knowing that the Plan was not a diversified portfolio, but was
 26 significantly invested in Company stock, the Prudence Defendants had a

1 heightened responsibility to divest the Plan of Company stock if it became or
2 remained imprudent.

3 177. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts
4 of interest and to resolve them promptly when they occur. A fiduciary must always administer a
5 plan with single-minded devotion to the interests of the participants and beneficiaries, regardless
6 of the interests of the fiduciaries themselves or the plan sponsor. Upon information and belief,
7 the compensation and tenure of the Prudence Defendants was tied to the performance of WaMu
8 stock and/or the publicly reported financial performance of WaMu. Fiduciaries laboring under
9 such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure
10 that their decision making process is untainted by the conflict and made in a disinterested
11 fashion, typically by seeking independent financial and legal advice obtained only on behalf of
12 the plan.
13
14

15 178. The Prudence Defendants breached their duty to avoid conflicts of interest and to
16 promptly resolve them by, *inter alia*, failing to engage prudent independent advisors who could
17 make independent judgments concerning the Plan's investment in WaMu; failing to notify
18 appropriate federal agencies, including the DOL, of the facts and circumstances that made
19 WaMu stock an unsuitable investment for the Plan; failing to take such other steps as were
20 necessary to ensure that participants' interests were loyally and prudently served; with respect to
21 each of these above failures, doing so in order to avoid adversely impacting their own
22 compensation or drawing attention to WaMu's inappropriate practices; and by otherwise placing
23 their own and WaMu's improper interests above the interests of the participants with respect to
24 the Plan's investment in WaMu stock.
25
26

1 179. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan
 2 documents or directives that it knows or reasonably should know would lead to an imprudent
 3 result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29
 4 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives
 5 that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor
 6 allow others, including those whom they direct or who are directed by the plan, to do so.
 7

8 180. Thus, even to the extent that the Plan required the fiduciaries to offer WaMu stock
 9 as an investment option, which Plaintiffs dispute, the Prudence Defendants breached their duty
 10 of prudence by continuing to offer WaMu stock as an investment option for participant
 11 contributions in the Plan, when the Prudence Defendants knew or should have known that
 12 WaMu stock no longer was a prudent investment for participants' retirement savings.
 13

14 181. As a consequence of the Prudence Defendants' breaches of fiduciary duties
 15 alleged in this Count, the Plan suffered significant losses. If the Prudence Defendants had
 16 discharged their fiduciary duties to prudently invest the Plan's assets, the losses suffered by the
 17 Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the
 18 breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiff and the other Class
 19 members, lost well over \$175 million dollars of retirement savings.
 20

21 182. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
 22 & (a)(3), the Prudence Defendants are liable to restore the losses to the Plan caused by their
 23 breaches of fiduciary duties alleged in this Count and to provide other equitable relief as
 24 appropriate.
 25

26 **B. Count II: Failure to Monitor Fiduciaries**

183. Plaintiff incorporates by this reference the allegations above.

184. This Count alleges fiduciary breach against the following Defendants: WaMu; the Director Defendants; and the HR Committee (the "Monitoring Defendants").

185. As alleged above, during the Class Period the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

186. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, as follows:

Monitoring Fiduciary	Monitored Fiduciary	Reference
WaMu	Investment Committee Defendants.	¶¶ 43-47
Director Defendants	Investment Committee Defendants.	¶¶ 48-50
HR Committee	Investment Committee and Administration Committee	¶¶ 51-53

187. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

188. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their

1 appointees were faithfully and effectively performing their obligations to plan participants or for
2 deciding whether to retain or remove them.

3 189. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with
4 complete and accurate information in their possession that they know or reasonably should know
5 that the monitored fiduciaries must have in order to prudently manage the plan and the plan
6 assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions
7 regarding the plan.
8

9 190. The Monitoring Defendants breached their fiduciary monitoring duties by, among
10 other things: (a) failing, at least with respect to the Plan's investment in Company stock, to
11 monitor their appointees, to evaluate their performance, or to have any system in place for doing
12 so, and standing idly by as the Plan suffered enormous losses as a result of their appointees'
13 imprudent actions and inaction with respect to Company stock; (b) failing to ensure that the
14 monitored fiduciaries appreciated the true extent of WaMu's highly risky and inappropriate
15 business practices, and the likely impact of such practices on the value of the Plan's investment
16 in WaMu stock; (c) to the extent any appointee lacked such information, failing to provide
17 complete and accurate information to all of their appointees such that they could make
18 sufficiently informed fiduciary decisions with respect to the Plan's assets; and (d) failing to
19 remove appointees whose performance was inadequate in that they continued to make and
20 maintain investments in WaMu stock despite their knowledge of practices that rendered WaMu
21 stock an imprudent investment during the Class Period for participants' retirement savings in the
22 Plan, and who breached their fiduciary duties under ERISA.
23
24

25 191. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the
26 Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary

1 monitoring duties as described above, the losses suffered by the Plan would have been
 2 minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary
 3 duty alleged herein, the Plan, and indirectly the Plaintiff and the other Class members, lost well
 4 over \$175 million dollars of retirement savings.

5
 6 192. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
 7 and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their
 8 breaches of fiduciary duties alleged in this Count and to provide other equitable relief as
 9 appropriate.

10 **C. Count III: Breach of Fiduciary Duty – Failure to Provide Complete and Accurate**
 11 **Information to the Plan’s Participants and Beneficiaries.**

12 193. Plaintiff incorporates by this reference the allegations above.

13 194. This Count alleges fiduciary breach against the Administration Committee
 14 Defendants (the “Communications Defendants”).

15 195. At all relevant times, as alleged above, Defendants listed in this Count were
 16 fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were
 17 bound by the duties of loyalty, exclusive purpose, and prudence.

18
 19 196. At all relevant times, the scope of the fiduciary responsibility of the Defendants
 20 included the communications and material disclosures to the Plan’s participants and
 21 beneficiaries.

22 197. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to
 23 participants, not to mislead them regarding the plan or plan assets, and to disclose information
 24 that participants need in order to exercise their rights and interests under the plan. This duty to
 25 inform participants includes an obligation to provide participants and beneficiaries of the plan
 26 with complete and accurate information, and to refrain from providing false information or

1 concealing material information, regarding plan investment options so that participants can make
2 informed decisions with regard to the prudence of investing in such options made available under
3 the plan. This duty applies to all of the Plan's investment options, including investment in
4 WaMu stock.

5
6 198. Because investments in the Plan were not diversified (*i.e.* the Defendants chose to
7 allow the Plan's assets to be invested heavily in WaMu stock), such investment carried with it an
8 inherently high degree of risk. This inherent risk made the Defendants' duty to provide complete
9 and accurate information particularly important with respect to WaMu stock.

10 199. The Defendants breached their duty to inform participants by failing to provide
11 complete and accurate information regarding WaMu's serious mismanagement and improper
12 business practices and public misrepresentations, and the consequential artificial inflation of the
13 value of WaMu stock, and, generally, by conveying incomplete information regarding the
14 soundness of WaMu stock and the prudence of investing and holding retirement contributions in
15 WaMu equity. These failures were particularly devastating to the Plan and its participants; a
16 large percentage of the Plan's assets were invested in WaMu stock during the Class Period and,
17 thus, losses in this investment had a significant impact on the value of participants' retirement
18 assets.
19

20 200. Defendants' omissions clearly were material to participants' ability to exercise
21 informed control over their Plan accounts, as in the absence of the information, participants did
22 not know the true risks presented by the Plan's investment in WaMu stock.

23 201. Defendants' omissions and incomplete statements alleged herein were Plan-wide
24 and uniform in that Defendants failed to provide complete and accurate information to any of the
25 Plan's participants.
26

1 202. Defendants in this Count were unjustly enriched by the fiduciary breaches
2 described in this Count.

3 203. As a direct and proximate result of the breaches of fiduciary duties alleged herein,
4 the Plan, and indirectly the Plaintiff and the Plan's other participants and beneficiaries, lost a
5 significant portion of their retirement investment.
6

7 204. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409(a), 29
8 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Plan caused by
9 their breaches of fiduciary duties alleged in this Count.

10 **D. Count IV: Co-Fiduciary Liability**

11 205. Plaintiff incorporates by this reference the allegations above.

12 206. This Count alleges co-fiduciary liability against the following Defendants: all
13 Defendants (the "Co-Fiduciary Defendants").
14

15 207. As alleged above, during the Class Period the Co-Fiduciary Defendants were
16 named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries
17 within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were
18 bound by the duties of loyalty, exclusive purpose, and prudence.

19 208. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a
20 fiduciary, in addition to any liability which he may have under any other provision, for a breach
21 of fiduciary responsibility of another fiduciary with respect to the same plan if knows of a breach
22 and fails to remedy it, knowingly participates in a breach, or enables a breach. The Co-Fiduciary
23 Defendants breached all three provisions.
24

25 209. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C.
26 § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary

1 if, he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts
2 under the circumstances to remedy the breach. Each Defendant knew of the breaches by the
3 other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches. In
4 particular, they did not communicate their knowledge of the Company's illegal activity to the
5 other fiduciaries.
6

7 210. WaMu, through its officers and employees, engaged in highly risky and
8 inappropriate business practices, withheld material information from the market, and profited
9 from such practices, and, thus, knowledge of such practices is imputed to WaMu as a matter of
10 law.

11 211. Because Defendants knew of the Company's failures and inappropriate business
12 practices, they also knew that the Prudence Defendants were breaching their duties by continuing
13 to invest in Company stock. Yet, they failed to undertake any effort to remedy these breaches.
14 Instead, they compounded them by downplaying the significance of WaMu's failed and
15 inappropriate business practices, and obfuscating the risk that the practices posed to the
16 Company, and, thus, to the Plan.
17

18 212. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1),
19 imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with
20 respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an
21 act or omission of such other fiduciary, knowing such act or omission is a breach. WaMu
22 knowingly participated in the fiduciary breaches of the Prudence Defendants in that it benefited
23 from the sale or contribution of its stock at prices that were disproportionate to the risks for Plan
24 participants. Likewise, the Monitoring Defendants knowingly participated in the breaches of the
25 Prudence Defendants because, as alleged above, they had actual knowledge of the facts that
26

1 rendered WaMu stock an imprudent retirement investment and yet, ignoring their oversight
2 responsibilities, permitted the Prudence Defendants to breach their duties.

3 213. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability
4 on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the
5 administration of his specific responsibilities which give rise to his status as a fiduciary, he has
6 enabled another fiduciary to commit a breach.

7
8 214. The Monitoring Defendants' failure to monitor the HR and Investment
9 Committees enabled those committees to breach their duties.

10 215. As a direct and proximate result of the breaches of fiduciary duties alleged herein,
11 the Plan, and indirectly the Plaintiff and the Plan's other participants and beneficiaries, lost well
12 over \$175 million dollars of retirement savings.

13
14 216. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
15 and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plan caused by their
16 breaches of fiduciary duties alleged in this Count and to provide other equitable relief as
17 appropriate.

18 **E. Count V: Knowing Participation in a Breach of Fiduciary Duty.**

19 217. Plaintiff incorporates the allegations contained in the previous paragraphs of this
20 Complaint as if fully set forth herein.

21
22 218. To the extent that WaMu is found not to have been fiduciary or to have acted in a
23 fiduciary capacity with respect to the conduct alleged to have violated ERISA, WaMu knowingly
24 participated in the breaches of those Defendants who were fiduciaries and acted in a fiduciary
25 capacity and as such is liable for equitable relief as a result of participating in such breaches.
26

220. The Plan suffered well over \$175 million dollars in losses because substantial assets of the Plan were imprudently invested or allowed to be invested by Defendants in WaMu stock during the Class Period, in breach of Defendants' fiduciary duties.

222. The Prudence Defendants also are liable for losses that resulted from their decision to invest nearly all of the assets of the Company Stock Fund in WaMu stock rather than cash or other short-term investment options, as authorized by the Plan, and clearly prudent under the circumstances presented here.

223. Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating WaMu stock as an investment alternative when it

1 became imprudent, and divesting the Plan of WaMu stock when maintaining such an investment
 2 became imprudent, the Plan would have avoided some or all of the losses that it, and indirectly,
 3 the participants suffered.

4 **XIII. REMEDY FOR BREACHES OF FIDUCIARY DUTY**

5 224. The Defendants breached their fiduciary duties in that they knew or should have
 6 known the facts as alleged above, and therefore knew or should have known that the Plan's
 7 assets should not have been invested in WaMu stock during the Class Period.

8 225. As a consequence of the Defendants' breaches, the Plan suffered significant
 9 losses.
 10

11 226. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring
 12 a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires
 13 "any person who is a fiduciary...who breaches any of the...duties imposed upon fiduciaries...to
 14 make good to such plan any losses to the plan...." Section 409 also authorizes "such other
 15 equitable or remedial relief as the court may deem appropriate...."
 16

17 227. With respect to calculation of the losses to the Plan, breaches of fiduciary duty
 18 result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made
 19 or maintained its investments in the challenged investment and, instead, prudent fiduciaries
 20 would have invested the Plan's assets in the most profitable alternative investment available to
 21 them. Alternatively, losses may be measured not only with reference to the decline in stock price
 22 relative to alternative investments, but also by calculating the additional shares of WaMu stock
 23 that the Plan would have acquired had the Plan fiduciaries taken appropriate steps to protect the
 24 Plan. The Court should adopt the measure of loss most advantageous to the Plan. In this way,
 25
 26

1 the remedy restores the Plan's lost value and puts the participants in the position they would have
 2 been in if the Plan had been properly administered.

3 228. Plaintiff and the Class are therefore entitled to relief from the Defendants in the
 4 form of: (a) a monetary payment to the Plan to make good to the Plan the losses to the Plan
 5 resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial
 6 based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a);
 7 (b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as
 8 provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3); (c)
 9 injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C.
 10 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach; (d) reasonable
 11 attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common
 12 fund doctrine, and other applicable law; (e) taxable costs and interest on these amounts, as
 13 provided by law; and (6) such other legal or equitable relief as may be just and proper.
 14

15 229. Under ERISA, each Defendant is jointly and severally liable for the losses
 16 suffered by the Plan in this case.
 17

18 **XIV. CLASS ACTION ALLEGATIONS**

19 230. **Class Definition.** Plaintiff brings this action as a class action pursuant to Rules
 20 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of Plaintiff and
 21 the following class of persons similarly situated (the "Class"):
 22

23 231. All persons, other than Defendants, who were participants in or beneficiaries of
 24 the Plan at any time between July 19, 2006 and the present and whose accounts included
 25 investments in WaMu stock.
 26

1 232. **Class Period.** The fiduciaries of the Plan knew or should have known at least by
2 July 19, 2006 that the Company's material weaknesses were so pervasive that WaMu stock could
3 no longer be offered as a prudent investment for a retirement plan.

4 233. **Numerosity.** The members of the Class are so numerous that joinder of all
5 members is impracticable. While the exact number of Class members is unknown to Plaintiff at
6 this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are,
7 based on the Plan's Form 5500 for Plan year 2005, more than 70,000 members of the Class who
8 participated in, or were beneficiaries of, the Plan during the Class Period.

9 234. **Commonality.** Common questions of law and fact exist as to all members of the
10 Class and predominate over any questions affecting solely individual members of the Class.
11 Among the questions of law and fact common to the Class are:
12

13 (a) whether Defendants each owed a fiduciary duty to Plaintiff and members of the
14 Class;
15

16 (b) whether Defendants breached their fiduciary duties to Plaintiff and members of
17 the Class by failing to act prudently and solely in the interests of the Plan's participants and
18 beneficiaries;
19

20 (c) whether Defendants violated ERISA; and

21 (d) whether the Plan has suffered losses and, if so, what is the proper measure of
22 damages.

23 235. **Typicality.** Plaintiff's claims are typical of the claims of the members of the
24 Class because: (a) to the extent Plaintiff seeks relief on behalf of the Plan pursuant to ERISA
25 § 502(a)(2), his claim on behalf of the Plan is not only typical to, but identical to a claim under
26 this section brought by any Class member; and (2) to the extent Plaintiff seeks relief under

1 ERISA § 502(a)(3) on behalf of himself for equitable relief, that relief would affect all Class
2 members equally.

3 236. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the
4 members of the Class and has retained counsel competent and experienced in class action,
5 complex, and ERISA litigation. Plaintiff has no interests antagonistic to or in conflict with those
6 of the Class.
7

8 237. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is
9 warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the
10 Class would create a risk of adjudications with respect to individual members of the Class which
11 would, as a practical matter, be dispositive of the interests of the other members not parties to the
12 actions, or substantially impair or impede their ability to protect their interests.
13

14 238. **Other Rule 23(b) Requirements.** Class action status is also warranted under the
15 other subsections of Rule 23(b) because: (1) prosecution of separate actions by the members of
16 the Class would create a risk of establishing incompatible standards of conduct for Defendants;
17 (2) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby
18 making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect
19 to the Class as a whole; and (3) questions of law or fact common to members of the Class
20 predominate over any questions affecting only individual members and a class action is superior
21 to the other available methods for the fair and efficient adjudication of this controversy.
22

23 XV. PRAYER FOR RELIEF

24 WHEREFORE, Plaintiff prays for:

25 A. A Declaration that the Defendants, and each of them, have breached their ERISA
26 fiduciary duties to the participants;

1 B. A Declaration that the Defendants, and each of them, are not entitled to the
2 protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

3 C. An Order compelling the Defendants to make good to the Plan all losses to the
4 Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan
5 resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the
6 Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the
7 participants would have made if the Defendants had fulfilled their fiduciary obligations;

8 D. Imposition of a Constructive Trust on any amounts by which any Defendant was
9 unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

10 E. An Order requiring Defendants to appoint one or more independent fiduciaries to
11 participate in the management of the Plan's investment in WaMu stock;

12 F. Actual damages in the amount of any losses the Plan suffered, to be allocated
13 among the participants' individual accounts in proportion to the accounts' losses;

14 G. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

15 H. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29
16 U.S.C. § 1132(g), and other applicable law; and

17 I. An Order for equitable restitution and other appropriate equitable and injunctive
18 relief against the Defendants.
19
20
21
22
23
24
25
26

1 Dated: November 20, 2007.

2 KELLER ROHRBACK L.L.P.

3
4 By: 

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